

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRUCE KEITHLY and DONOVAN LEE,
Individually and on Behalf of all Others
Similarly Situated,

Interim Lead Plaintiffs,

v.

INTELIUS, INC., A Delaware Corporation; and
INTELIUS SALES, LLC, A Nevada Limited
Liability Company,

Defendants

v.

ADAPTIVE MARKETING, LLC, a Delaware
Limited Liability Company,

Third Party Defendant.

No. C09-1485RSL

PLAINTIFFS' MOTION FOR
RECONSIDERATION

Noted for Consideration:
February 22, 2011

I. INTRODUCTION

Pursuant to Local Rule CR 7(h), Plaintiffs respectfully ask the Court to reconsider one part of its holding in its Order Granting in Part Intelius' Motion for Judgment on the Pleadings ("Order") (Dkt. # 110). Specifically, Plaintiffs request the Court reconsider its dismissal of Plaintiff Donovan Lee's Washington Consumer Protection Act ("CPA") claim because he lacks standing under the CPA as an Ohio resident. (Order, p. 20). (Plaintiffs on this motion for reconsideration solely request the Court to allow Mr. Lee's CPA claim to proceed. Plaintiffs are

1 not requesting the Court rule on class certification, which will be raised separately in their class
 2 certification motion.) In dismissing Mr. Lee's CPA claim, the Court relied on *Schnall v. AT&T*
 3 *Wireless Servs., Inc.*, 168 Wn.2d 125 (2010) ("*Schnall*") to hold that Mr. Lee, as a nonresident of
 4 Washington state, is barred from bringing a claim under the CPA. However, on February 17,
 5 2011, in an unprecedented act, the Washington Supreme Court granted a motion for
 6 reconsideration and withdrew *Schnall v. AT&T Wireless Servs., Inc.*, 168 Wn.2d 125 (2010).
 7 See, *Schnall v. AT&T Wireless Servs., Inc.*, No. 80572-5, (Wash. Feb. 17, 2011).

8 II. ARGUMENT

9 A court may reconsider a ruling under Local Rule CR 7(h)(1) if a party establishes
 10 "manifest error in the prior ruling or a showing of new facts or legal authority which could not
 11 have been brought to its attention earlier with reasonable diligence." Local Rule CR 7(h)(1).
 12 Plaintiffs' Motion for Reconsideration meets the very high standard set forth in Local Rule CR
 13 7(h).¹ Plaintiffs bring to the Court's attention new legal authority that could not have been
 14 brought to the Court's attention earlier because the Washington Supreme Court just recently
 15 issued its opinion granting Respondents' Motion for Reconsideration and Withdrawing its
 16 January 21, 2010 Opinion. *Id.* A copy of the Court's brief opinion vacating and withdrawing
 17 *Schnall v. AT&T Wireless Servs., Inc.*, 168 Wn.2d 125 (2010), is attached as Attachment A.

18 The Supreme Court's controversial ruling in *Schnall* limiting standing to Washington
 19 residents to bring a CPA claim was a new rule not found in the statute or prior case law.
 20 Plaintiffs could find *no* precedent for the proposition that a non-resident of Washington state,
 21 *qua* non-resident, was barred from bringing a CPA claim prior to the issuance of the Supreme
 22 Court's January 21, 2010 *Schnall* opinion. In fact, prior to *Schnall*, numerous Washington state
 23 and federal courts allowed non-residents to bring CPA claims against Washington corporations,
 24 or where the requisite "trade or commerce" element was met. See, e.g., *Curtis v. Northern Life*
 25

26 ¹ Local Rule CR 7(h)(2) also indicates that a motion must be filed "within fourteen days after the order to which it relates is filed." The Court's Order dismissing Mr. Lee's CPA claim was issued on February 8, 2011, and the instant motion has been filed on February 22, 2011. Thus, Plaintiffs' motion is timely.

1 *Ins. Co.*, 2008 WL 4927365 at *10 (Wash.App. 2008)(“[T]he Washington CPA applied to
 2 nonresident plaintiffs who sought class certification in a lawsuit against a Washington
 3 business.”); *Schnall v. AT&T Wireless Servs., Inc.*, 139 Wn.App. 280 (2007)(affirming trial
 4 court’s holding that “the legislature intended that the CPA regulate Washington businesses
 5 whether their conduct affects Washington or non-Washington consumers”); *Kelley v. Microsoft*,
 6 251 F.R.D. 554, 552 (W.D. Wash. 2008) (non-resident and resident Plaintiffs permitted to bring
 7 Washington CPA claim against Microsoft because Microsoft “resides and created the unfair or
 8 deceptive marketing scheme” in Washington) (Pechman, J.).

9 There is no territorial or jurisdictional requirement of standing beyond the five elements
 10 of a CPA claim. The five elements of the CPA are: (1) unfair or deceptive act or practice; (2)
 11 occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her
 12 business or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title*
 13 *Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). In *Hangman Ridge*, the Supreme Court
 14 described a “successful plaintiff” as “one who establishes all five elements of a private CPA
 15 action.” *Id.* at 795. The Supreme Court has additionally noted that “*any person*” who
 16 establishes the five elements of a CPA claim may bring such a claim. *Id.* (emphasis added). The
 17 private person enforcement provision of the CPA, RCW 19.86.090, allows a civil action for “any
 18 person” who is injured, and does not require the injured party to be a Washington resident.
 19 Washington Courts have held that “[t]he concerns that typically underlie the issue of “standing”
 20 are already addressed by the [] elements, particularly the limitations imposed by the need to
 21 prove injury and public interest impact.” *Stephens v. Omni Ins. Co.*, 138 Wn.App. 151, 159 P.3d
 22 10 (2007) (holding that the “trade or commerce” element did not have to contain a consumer
 23 transaction). Thus, there is no additional residential standing requirement under the statute.

24 The CPA’s “trade or commerce” element provides a territorial and jurisdictional limit by
 25 requiring a nexus with Washington state. *See* RCW 19.86.020. (“[U]nfair or deceptive acts or
 26 practices in the conduct of any trade or commerce are hereby declared unlawful.”). RCW

1 19.86.010(2) provides: “[t]rade’ and ‘commerce’ shall include the sale of assets or services, and
 2 any commerce directly or indirectly affecting the people of the state of Washington.” The
 3 Legislature intended the terms “trade” or “commerce” to be construed broadly. *Hangman Ridge*,
 4 105 Wn.2d at 785; RCW 19.86.920 (“It is [] the intent of the legislature that this act shall be
 5 liberally construed that its beneficial purpose may be served.”). *Id.* at 788. It is a long-standing
 6 principle that the Washington Supreme Court has interpreted the CPA liberally to serve its
 7 beneficial purposes. *See, e.g., Hockley v. Hargitt*, 82 Wn.2d 337, 350-51 (1973).

8 Prior to *Schnall*, it was equally well-established by the Washington Supreme Court that
 9 the CPA’s reach within the term “commerce” in RCW 19.86.020 extended beyond Washington
 10 State’s borders. For instance, in *State v. Reader’s Digest Ass’n, Inc.*, 81 Wn.2d 259, 501 P.2d
 11 290 (1972), the Supreme Court ruled that the CPA’s term “commerce” extended interstate. The
 12 Court specifically stated:

13 Furthermore, respondent’s interpretation of RCW 19.86.170 would limit the
 14 application of RCW 19.86.020 strictly to intrastate commerce since the FTC has
 15 authority to monitor all interstate business. Such a result would require us to
 16 ignore RCW 19.86.920 which provides that in determining the relative market or
 17 effective area of competition we should not be limited to the boundaries of this
 18 state.

19 *Id.* at 279-280; *see also, Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987)
 20 (“Prior rulings by this court have broadly interpreted this [trade or commerce] provision to
 21 include *every* person conducting unfair acts in *any* trade or commerce”)(emphasis added); *Short*
 22 *v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984)(“The CPA, on its face, shows a carefully
 23 drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or
 24 practices in *any* trade or commerce.”)(emphasis in original). Thus, under the plain terms of the
 25 statute, and as interpreted by the Washington Supreme Court, “any person,” includes a non-
 26 Washington resident who is injured by another person² if that person’s acts or practices occur in
 “trade or commerce.”

² RCW 19.86.010(1) provides: “Person” shall include, where applicable, natural persons, corporations, trusts, unincorporated associations and partnerships.

1 Here, Intelius' unfair and deceptive acts alleged by Plaintiffs occurred in trade and
 2 commerce, both directly and indirectly affecting the people of the state of Washington. First, the
 3 practices at the heart of the Complaint, Intelius' Internet practices, are nationwide in scope, and
 4 affect Washington residents directly as consumers.

5 Second, the statute's terms "indirectly affect" also clearly expresses intent to cover
 6 transactions even where the people of Washington are not direct purchasers or consumers (or
 7 sellers). Intelius' deceptive Internet sales are "indirectly affecting the people of Washington,"
 8 and, if unchecked, will lower standards for straightforward dealing on the Internet, which will
 9 ultimately hurt Washington consumers and businesses.

10 Third, Intelius is a Washington corporation. It is headquartered in Bellevue, Washington.
 11 The deceptive acts alleged in Plaintiffs' complaint originated in Washington. Intelius' deceptive
 12 and unfair acts relating to the operation of its website, and its enrollment of unsuspecting
 13 consumers occurred in Washington. The website, software code and marketing materials were
 14 designed in Washington. All of the billing and disclosure decisions were made by Intelius
 15 employees in Washington. Intelius' business activities, including its unfair and deceptive acts,
 16 affect the people of Washington. Washington has a strong interest in regulating the activities of
 17 Washington business, and as a Washington business, Intelius is subject to Washington law.
 18 (Indeed, Intelius's Terms of Use provides that Washington law governs.) Thus Intelius'
 19 deceptive or unfair acts are alleged to take place in Washington, and are "in commerce" that
 20 "directly or indirectly" affect the people of the state of Washington. The fact that Plaintiffs
 21 allege that Intelius' unfair and deceptive acts occurred and originated in Washington is sufficient
 22 to satisfy the "trade or commerce" requirement of the CPA. *Cf. Kelley v. Microsoft*, 251 F.R.D.
 23 544, 553 (W.D. Wash. 2008) ("[T]he Court gives greater weight to the fact that the allegedly and
 24 unfair acts originated in Washington given that the location of the injury is fortuitous...
 25 Defendant [is] one of Washington's largest corporate citizens, and the acts complained of by
 26 Plaintiffs took place in Washington.").

1 Nothing in the CPA suggests that acts and practices are only illegal where they
 2 exclusively affect the people of Washington. Interpreting the CPA to allow nonresidents to sue a
 3 Washington company that is engaged in unfair or deceptive practices makes sense. It makes
 4 little sense for courts to narrow the scope of the CPA to the protection of Washington only
 5 residents, especially when a nonresident may bring a lawsuit in Washington that will benefit –
 6 and include – Washington consumers. It would be unfair to allow a Washington business to be
 7 able to scam the residents of 49 other states, so long as it does not directly scam Washington
 8 residents. As the Washington Attorney General’s Amicus Brief Requesting Reconsideration of
 9 the Washington Supreme Court’s *Schnall* opinion provides,

10 If the Court intended to hold that the Attorney General is not authorized to bring
 11 CPA actions against Washington entities that direct unfair and deceptive practices
 12 only to out-of-state residents, then it has created an opportunity for unscrupulous
 13 entities to easily avoid liability under the CPA. For example, a Washington
 14 business that engages in unfair or deceptive direct mail marketing practices could
 15 escape liability under the CPA by sending its materials only to consumers with
 out-of-state zip codes. Further, under the Court’s new rule, *a private litigant from
 Idaho who was injured by the deceptive conduct of a Spokane business would not
 be able to bring a private CPA action, even if the Idaho resident sought injunctive
 relief that would benefit Washington consumers.*

16 This result is contrary to RCW 19.86.920, which provides that the purpose of the
 17 CPA is to protect the public and foster fair and honest competition. Allowing
 18 Washington businesses to engage in unfair and deceptive practices, so long as
 Washington residents are not directly injured, does not foster fair and honest
 competition.

19 Memorandum of Amicus Curiae Att’y Gen. of Wash. on Reconsideration, *Schnall v. AT&T*
 20 *Wireless Servs., Inc.*, No. 80572-5, p. 5 (Wash. Feb. 16, 2010) (emphasis added) (attached as
 21 Attachment B).

22 Setting aside these policy implications, *Schnall* has been withdrawn and thus is neither
 23 persuasive nor binding authority.³ Therefore Plaintiffs request the Court reconsider its Order in
 24 light of the Washington Supreme Court’s withdrawal of *Schnall*, and hold, based on the statute

25 ³ The Order provides that a new opinion will be issued in due course. One of the bases for Respondents’ motion for
 26 reconsideration was mootness: at the time of the Court’s decision, the parties had settled the case. *See*, Brief for
 Respondent at 1, *Schnall v. AT&T Wireless Servs., Inc.*, No. 80572-5, (Wash. February 10, 2010), attached as
 Attachment C.

1 and applicable case law, that Mr. Lee as a non-Washington resident may bring a CPA claim
2 against Intelius based on his allegations that Intelius' deceptive acts and practice occurred in
3 "commerce," as that term is defined by the CPA and interpreted by case law.

4 **III. CONCLUSION**

5 Plaintiffs respectfully request the Court to reconsider its holding, and based on the statute
6 and 30 years of case law prior to *Schnall*, hold that Plaintiff Donovan Lee has standing to bring a
7 Washington Consumer Protection Act claim against Intelius.

8 DATED this 22nd day of February, 2011.

9
10
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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2011, I caused to be served a true and correct copy of PLAINTIFFS' MOTION FOR RECONSIDERATION on the following recipients via the method indicated:

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